Ethernet services at retail in AT&T's region, it has done so using 1) its on-net facilities; 2) TDM loops purchased from AT&T; and 3) an extremely limited number of competitive facilities. As TWTC has only deployed loops to approximately 27 percent of the buildings in which its customers are located, it must rely upon AT&T TDM facilities, which, as I discuss below, are becoming increasingly unviable as a wholesale input for retail Ethernet. As a consequence, TWTC has only been able to serve a small subset of the market that it could otherwise reach if it could obtain finished Ethernet services from AT&T on reasonable terms and conditions.

10. **[AT&T proprietary begin]**

See Casto Declaration

[AT&T proprietary end] [proprietary begin]

11.

12.

13.

14.

15. **[proprietary end]**

17. Mr. Casto argues that, even if AT&T's wholesale prices for finished Ethernet are too high to allow TWTC to compete, TWTC can simply purchase AT&T's TDM special access under its 2005 agreement with AT&T and TWTC can supply its own Ethernet electronics. *See Casto Declaration* ¶¶ 19-22. For this reason, Mr. Casto argues that AT&T's finished Ethernet

loops are not a necessary input for TWTC's Ethernet services. As I explained in my initial declaration, TWTC does in fact purchase some TDM circuits from AT&T to provide Ethernet services at retail. *See Taylor Declaration* ¶43. However, in many situations, Ethernet over AT&T-provided TDM circuits is not a viable option to serve the customer because of the additional costs and inefficiencies involved. I explain these costs and inefficiencies below.

18. *First*, as I explained in my initial declaration, Ethernet over TDM requires the purchase of additional, unneeded electronics. See Taylor Declaration ¶¶ 26,43. When TWTC (or any other CLEC) purchases a TDM loop, that circuit comes with TDM electronics. Although TWTC does not pay a separate charge for these TDM electronics, the fixed cost of these electronics is surely incorporated into the monthly recurring charge for the circuit.[4] TWTC must then place Ethernet customer premises electronics (the "Overture" box) on top of the existing TDM electronics to enable TWTC to offer Ethernet service. The Overture solution adds an additional **[proprietary begin] [proprietary end]** in cost per circuit depending upon the configuration and capacity of the circuit. TWTC is therefore essentially paying "double" for the electronics to provide Ethernet over TDM: once for the TDM electronics and once for the Overture equipment to convert the TDM signal to Ethernet.[5]

19. *Second,* in order for TWTC to provide Ethernet over TDM in areas that are not close to the AT&T/TWTC point of interconnection ("the POI") (which is usually located in a

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[4] As Mr. Casto correctly explains with respect to the cost of Ethernet electronics, when a wholesaler provides finished Ethernet service "it is the wholesale Ethernet provider that purchases and deploys Ethernet electronics, the costs of which are then included in the overall rate for the finished Ethernet access service." *Casto Declaration ¶21. The same is true of TDM services.*

[5] Mr. Casto asserts that, in my discussion of TDM loops as inputs to Ethernet service, I observed that TWTC must purchase Ethernet electronics when in fact, Mr. Casto asserts all carriers seeking to provide Ethernet service must purchase such electronics. *See id.* But the point is not that TWTC must purchase Ethernet electronics when relying on TDM loops, but that TWTC must purchase *TDM electronics in addition* to Ethernet electronics.

large AT&T central office in a downtown area) TWTC must not only pay for the TDM loop, but also pay substantial mileage charges for transport from the local serving office ("LSO") in the distant area to the AT&T/TWTC POI. As offered by AT&T under both its month-to-month tariff and its volume discount offers, the transport circuit has both a fixed capacity charge and a substantial variable mileage charge component.[6] **[proprietary begin] [proprietary end]**

20. Ethernet over TDM also increases TWTC's costs because TWTC must purchase much more TDM capacity than it needs to provide the Ethernet service. For example, a DS3 provides approximately 45 Mbps of bandwidth. If a customer demands a 50 Mbps Ethernet loop (a level of service offered by both AT&T and TWTC), TWTC must purchase two DS3s from AT&T. Because of bandwidth loss that occurs when TDM is converted into Ethernet, the customer does not receive 90 Mbps of bandwidth. Rather, assuming a 512 kbps frame (essentially a packet) size, two DS3s only provide 66.5 Mbps of Ethernet bandwidth. Indeed, using Ethernet over TDM results in between a 4 to 30 percent bandwidth loss from the TDM circuit. Under TWTC's pricing flexibility contract with AT&T, two DS3s of capacity costs TWTC $1,674.12 assuming no interoffice mileage. If there were five interoffice miles, two DS3s would cost an astronomical $3,024.12 per month ($1,674.12 + $900 (fixed interoffice charge) + ($90 x 5) (interoffice mileage charge)). **[proprietary begin] [proprietary end]**

21. If a customer demands a 100 Mbps Ethernet circuit, TWTC must purchase an OC-3 circuit (155.52 Mbps) which will only provide 146 Mbps per second of actual throroughput given a 5 12 kbps frame. This is because three DS3s are generally not suitable to provision a 100 Mbps Ethernet circuit since, assuming a 5 12 kbps frame, three DS3s actually provides less than 100 Mbps of Ethernet bandwidth. An OC-3 circuit under the current AT&T/TWTC discount

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[6] *See* SBWT FCC Tariff No. 73 § 7.3.10 (for DS1s); *id.* § 39.5.2 (for DS3s).

contract costs $1670 assuming no interoffice mileage. If there were five interoffice miles, an OC-3 would cost $3,656 ($1670 + $886 (fixed interoffice charge) + ($220 x 5) (interoffice mileage charge)). **[proprietary begin] [proprietary end]**

22. The inefficiencies are highest at the lowest (10 Mbps) Ethernet capacity. A single 45 Mbps DS3 circuit costs $836.06 per month under the AT&T/TWTC contract assuming no interoffice mileage. If there were five interoffice miles, the cost would be $1512 per month ($837 + $450 (fixed interoffice charge) + ($45 x 5) (interoffice mileage charge)) under AT&T's contract tariff. **[proprietary begin]**

23. **[proprietary end]**

24. *Fourth,* reliance on TDM loops introduces additional points of potential failure into the circuit. Moreover, identifying the source of service problems is slower, more complex and likely more costly when TWTC must rely on two sets of equipment rather than one. If there is a problem with service quality and a circuit provisioned with both TDM and Ethernet electronics goes down, TWTC must send its technicians to the site and AT&T must also send its technicians to the site to determine whether the failure was caused by TWTC's equipment, AT&T's equipment, AT&T's circuit, or some combination of these. Because these locations are often far from the areas where TWTC has built a substantial portion of its network facilities, maintenance calls can take several hours, adding substantial cost and delay to restoring the customer's service. Indeed, unlike AT&T, TWTC only has a handful of technicians in each metropolitan area that it serves, and trouble on multiple distant circuits forces TWTC to hire more technicians. By contrast, if TWTC purchases a finished Ethernet loop, as Mr. Casto explains, only AT&T has the responsibility for visiting the customer site if the service goes down. *See Casto Declaration* ¶ 12. In addition, where TWTC self-deploys its own Ethernet

loops, service repair and maintenance truck-rolls are generally much less costly in terms of labor and time because TWTC can only deploy loop facilities close to its existing network, decreasing the distance that must be traveled by the techs and increasing their utilization.

25. As a result of these additional costs and inefficiencies, TWTC can only serve a small subset of the market when relying on TDM transmission inputs than it could otherwise serve if it could obtain finished Ethernet loops on reasonable terms and conditions. **[proprietary begin] [proprietary end]**

26. Mr. Casto also misconstrues or is non-responsive to several of the points I made in my initial declaration. **[proprietary begin] [proprietary end] [AT&T proprietary begin]**

See Casto

Declaration ¶ 33.

[AT&T proprietary end] [proprietary begin]

[proprietary end] [AT&T proprietary begin]

27.

See Casto

Declaration ¶ 35. **[AT&T proprietary end]**

[proprietary begin] [proprietary end]

28. Mr. Casto points to a joint TWTC/SBC press release in an attempt to show that TWTC willingly and gladly signed their 2005 special access agreement. He notes that TWTC stated at the time that the contract "strengthens Time Warner Telecom's ability to compete

effectively for the nationwide business market." *Casto Declaration.* ¶ 42 & n.3 1. It is true that TWTC was able to provide services to more locations under that discount plan than under the extremely high rates that TWTC was forced to buy previously. But this is an obvious point. **[proprietary begin] [proprietary end]**

29. Mr. Casto is correct that signing the contract was better than not signing the contract, but this says little about whether the terns of that contract are just and reasonable or sufficient to allow TWTC to expand the scope of its service offerings. **[AT&T proprietary begin]**

See id ¶ 43.

[AT&T proprietary end] Because of the absence of alternatives to AT&T's ubiquitous network, TWTC has had to agree to unreasonable terms and conditions in order to obtain prices that permit TWTC to use AT&T's facilities in limited cases.

30. **[proprietary begin] [proprietary end] [AT&T proprietary begin]**

31.

Casto Declaration

36

(id.)

[AT&T proprietary end] [proprietary begin]

32.

33. **[proprietary end]**

34. TWTC also has obtained substantial anecdotal evidence that AT&T is able to undercut TWTC's Ethernet rates even further because it sometimes offers its retail customers the *intrastate* rate for its Ethernet services. Because many states have largely deregulated their special access services, TWTC in many cases has neither the right to obtain these prices nor does it know what these prices are. However, anecdotal evidence indicates that AT&T's intrastate rates are, in many cases, substantially below their interstate rates.

35. **[AT&T proprietary begin]**

See Casto Declaration ¶40.

36. **[AT&T proprietary end] [proprietary begin] proprietary end] [AT&T proprietary begin]**

37.

See Casto Declaration ¶39.

[AT&T proprietary end] [proprietary begin]

[proprietary end]

38. As I explained in my initial declaration, because TWTC *must rely on* ILEC local transmission facilities to reach customer locations to which TWTC cannot efficiently deploy its own facilities, TWTC must work with the ILEC to gain class of service and appropriate prioritization of IP packets as they traverse the ILEC's facilities. Otherwise TWTC cannot provide IP VPN service to customers served by AT&T's facilities. *See id.* ¶¶ 29-30.

[proprietary begin] [proprietary end]

39. **[AT&T proprietary begin]**

Casto Declaration ¶38.

[AT&T

proprietary end] [proprietary begin] [proprietary end]

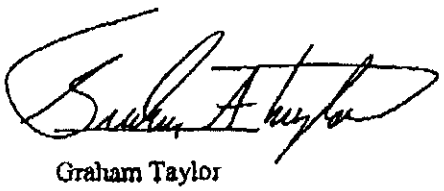
40. **[AT&T proprietary begin]**

[AT&T proprietary end] [proprietary begin] [proprietary end]

REDACTED-FOR PUBLIC INSPECTION

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on July 25, 2006



Graham Taylor

Graham Taylor Reply Declaration

Exhibit 1

[redacted for public inspection]

Appendix B

[redacted for public inspection]

Appendix C

TWTC and One Communications subscribe to a number of Standard special access pricing plans offered by the ILECs. As discussed in the comments, there are three types of discount plans offered by the ILECs: (1) "Term" discount plans that require no monetary or circuit commitment, but generally offer the smallest discount and often lack key benefits such as circuit portability; (2) "Standard" discounts that are available to any qualifying purchaser, that generally require a circuit commitment level, and that apply to rates charged in both Phase II and price cap MSAs and (3) "Overlay" contract tariffs that are individually negotiated with a particular purchaser and then filed publicly. The following are summaries of the Term, Standard and Overlay plans under which either TWTC or One Communications (or in some cases both) purchases special access services from the ILECs. These plans are representative of the ILEC plans under which the two companies purchase the vast majority of service access services from ILECs. As the summaries make clear, the discount plans to which TWTC and One Communications subscribe bear all of the characteristics of exclusionary pricing.

Ameritech Tariff FCC No. 2, Section 7.4.10: Special Access Service, Rate Regulations, Optional Payment Plan (Term discount)

The Ameritech Optional Payment Plan ("OPP") applies to the northern Midwest regions where AT&T provides local exchange service. The OPP is a term plan. It requires no minimum volume commitment in revenues or number of circuits or channel terminations. The OPP offers rate stabilization at a discount, preventing rates from increasing while allowing customers to receive the benefit of any rate decreases. *See* Section 7.4.10. In order to obtain the guaranteed rates, the customer must commit to a term per circuit between 1 and 5 years, with the discounts scaled to increase with the commitment period.

There are several aspects of the OPP that push customers to enter into Overlay agreements as a supplement to the OPP (as TWTC has done). First, the discounts in the OPP is modest. Second, significant termination penalties apply if the customer cancels the plan before expiration of the commitment period. Generally, AT&T calculates the termination penalty by determining the closest commitment period for which the customer could have completed and applying the rate to the period of service that the customer completed. For example, if a customer subscribed to DS3 services under an OPP for a 60-month term but canceled the OPP after 37 months, AT&T would charge the customer the difference between 37 months at the discounted rate for a 36-month commitment period and the 37 months at the discounted rate for the 60-month period. *See* Section 7.4.10(C). If the customer cancels the OPP within the first year of its commitment, however, the customer must disgorge all of the discounts.

Third and more importantly, the OPP places a customer at a significant disadvantage because the term plan does not offer circuit portability. Circuit portability allows a customer to move its circuits from one location to another without having to terminate one circuit and creating a new service order for a new one at new location and paying the concomitant fees. The OPP permits such moves without the added cost of terminating and re-ordering service in specific situations only. *See* Section 7.4.10(E). For DS1 services, the customer may port its circuits without added charges only in the same LATA. For DS3 services, the customer may port its circuits only if the customer has satisfied a 12-month minimum service period at the old location and either maintains or increases both the number of DS3 service channels and the length of the

commitment period at the new location. Termination penalties apply in most other circumstances in which a circuit is terminated before the end of the term. Portability is available in the Ameritech region only through the Overlay contract discussed below, which requires larger revenue or volume commitments. The availability of portability increases the savings value of these Overlay contracts and encourages the customer to make the revenue commitment.

Qwest FCC Tariff No. 1, Section 7 Private Line Transport Service (Standard discount)
The Qwest Regional Commitment Program ("RCP") is a Standard discount tariff, which offers a discount of up to 22 percent on its DS1 or DS3 services, depending on the types of circuits selected and the time period in which the customer subscribed to the plan. *See* Sections 7.1.3(B)(1); 7.99.4.5.(A). DS1 and DS3 circuits may not be combined for an aggregate discount. **[proprietary begin] [proprietary end]**

The discounts are only available, if the customer commits to maintaining 90 percent of the total number of circuits purchased from Qwest within its 14-state region for a term of at least two years. *See* Section 7.1.3.(B)(1). For example, a customer purchasing 1000 DS1 circuits from Qwest must commit at least 900 of those circuits to the RCP in order to obtain the discount. Only 100 of the DS1 circuits in the example customer's order may be UNEs in the 14-state region. The effect of this commitment is to limit the number of UNEs purchased from Qwest, driving the majority of the customer's spend to special access or forcing the customer to increase its special access purchase in direct proportion with any increase in its UNE purchase. Additionally, given that 90 percent of its spending with Qwest is for special access circuits albeit at discounted rates, the customer's spending with Qwest is likely to increase, which makes it infeasible for the customer to shift any of its purchasing needs to competitive special access providers.

The commitment level ratchets upward automatically as the customer's volume increases. For example, if the customer purchases 1200 DS1 circuits from Qwest, the commitment level automatically increases to 1080 DS1 circuits, *i.e.*, 90 percent of 1200. *See* Section 7.1.3.(B)(4). Moreover, there is no corresponding increase in the discount upon an increase in a volume commitment. The upward ratchet merely locks additional business into the RCP. It becomes even more onerous for a customer to move its traffic from Qwest to a competitor, because the automatic increases in commitment level forces the competitor to increase its spending level, leaving it no choice but to continue purchasing from Qwest despite the availability of competitors with low rates in some of the markets where the customer provides service.

Additionally, the termination penalties also increase with the number of committed circuits, making it unlikely that a customer would benefit from switching to a competitor. Qwest applies significant termination penalties under the RCP for failure to meet the 90 percent benchmark, a request to decrease the current commitment level, or for early termination of the RCP. A customer would incur a penalty of 50 percent of the amount to be paid during the rest of the term without the benefit of the RCP discount. *See* Section 7.1.3.(B)(5). For example, if the customer's average month-to-month, non-RCP price for a DS1 were $350, a customer with 1000 DS1s that terminated its RCP with 10 months left in the term would incur a penalty of $1.75 million.

$350.00/month * 50% * 1000 DS1 circuits * 10 months = $1,750,000.00

The same termination penalty also applies to any decrease in the commitment level. A customer that decreased its commitment level from 1000 circuits to 700 circuits would pay 50 percent of the undiscounted month-to-month price for the 300 circuits multiplied by the number of months left in the contract. Failure to meet the benchmark results in the customer paying the full month-to-month price for the shortfall for the month, but the RCP discount applies to the rest of the customer's purchase. The termination penalties give the customer a powerful incentive to maintain the commitment level at Qwest in the 14-state region, with the effect of tying up the customer's business with Qwest. This is a classic example of exclusionary pricing.

Although the Qwest RCP does offer circuit portability, the ILEC uses the advantage of portability to lock the customer into a more restrictive arrangement. The RCP requires the customer commit to bringing in an additional 10 percent revenue on the circuit in the new location before it may qualify for portability. *See* Section 7.1.1(D).

This tariff supersedes a pre-existing volume tariff for special access services. The new tariff offers 2 percent more in discounts but also adds more onerous terms. While the grandfathered RCP based its commitment levels on channel terminations only, the new RCP bases its commitment levels on the full circuit, which includes mileage and multiplexing charges as well as channel terminations. *Ca.* Section 7.99.5(A).

Verizon Tariff FCC No. 1, Section 25.1 Commitment Discount Plans ("CDP") for New Jersey, Pennsylvania, Delaware, District of Columbia, Maryland, Virginia, and West Virginia. (Standard discount)
Verizon Tariff FCC No. 11, Section 25.1 Commitment Discount Plans ("CDP") for New York and New England. (Standard discount)

The Verizon Tariff 1 CDP and Tariff 11 CDP (collectively, the "CDP") are Standard tariff discounts available to any customer in New Jersey, Pennsylvania, Delaware, District of Columbia, Maryland, Virginia, and West Virginia or in New England and New York, respectively, regardless of minimum revenue. The CDP offers different discounts for each of the services that are included. For example, a customer may receive as much as 35 percent off the base rate for a DS3 special access service if it commits to a term of 5 years. *See* Tariff 1 Section 25.1.4(D). Tariff 11 CDP offers terms of up to 7 years for certain services with a discount of 40 percent. *See* Tariff 11 Section 25.1.4. **[proprietary begin] [proprietary end]**

The CDP is based on a minimum commitment of channel terminations (counted as DS0 equivalents) for qualifying services, which include both special access services and the switched access DS1 and DS3 transport, despite the competitive availability of switched access transport services. Additionally, the CDP requires that the customer roll all qualifying services, including the switched access transport elements, into the CDP once the customer subscribes to a CDP. *See* Tariff 1 Section 25.1.2.(C); Tariff 11 Section 25.1.2. The CDP sets separate commitment periods for each type of service, and a customer may not subscribe to any other discount pricing plan until all the commitment periods for each of the services have expired. *See* Tariff 1 Sections 25.1.1(E); 25.1.8(C)(1)(c).

Once set, the discounts are not subject to any decreases and, in fact, customers may benefit from increases in discounts. However, certain rates for special access and other elements are not stabilized, *i.e.*, if Verizon chooses to increase its rates, the customer will be charged the increased rates with the same discounts under the CDP even though the discounts have been stabilized. *See* Tariff 1 Sections 25.1.5; 25.1.6. Tariff 11 CDP also permits customers to take advantage of any increases in discounts during the term of the plan, but it does not commit to rate stabilization like the Tariff 1 CDP, except for NYNEX Enterprise Services. *See* Tariff 11 Sections 25.1.8; 25.1.9; 25.1.10.

Also, the CDP offers customers the option of transferring time-in-service credits from existing Term Plans into the CDP, *i.e.*, Verizon allows customers to convert years spent in a Term Plan to years spent in a CDP. *See* Tariff 1 Section 25.1.8(F); Tariff 11 Section 25.1.10. However, Verizon only provides partial credit toward the commitment period with the conversion rate dipping as low as 12 months for a full 60 months. For example, if a customer has had a term plan for DS3 special access transport for a 60 month term, the customer may roll its DS3 Term Plan into a CDP and will receive only 12 months credit under the CDP for the 60 months that it has had already subscribe to Verizon's DS3 Term Plan. *See id.*

The minimum commitment begins at 90 percent of the total number of voice grade channel termination which are in-service at the time of subscription to the CDP. The 90 percent threshold applies to all services except for digital data services (DDS), for which commitment begins at 75 percent of the voice-grade channels terminations. *See* Tariff 1 Section 25.1.3(A)(6); Tariff 11 Section 25.1.3. The discounts apply to all channel terminations included within the minimum commitment level and allows for a 30 percent overage, *i.e.*, should the customer exceed its minimum commitment level, it will receive discounts for only an additional 30 percent of the minimum commitment. *See* Section Tariff 1 25.1.7(A)(1); Tariff 11 Section 25.1.7. For example, if a customer has a minimum commitment level of 1000 DS0 equivalents but has 1500 DS0 equivalents in service at the time of the true-up, the customer will only receive discounts on the initial 1000 for its minimum commitment level and 300 additional DS0-equivalent channel terminations (30 percent of the 1000-circuit commitment level). The remaining 200 channel terminations are priced at the non-discounted rates, unless the customer elects to adjust its minimum commitment level upwards. *See* Tariff 1 Section 25.7.1(D); Tariff 11 Section 25.1.7. Such undiscounted rates are not required if the customer chooses to increase its minimum commitment level. Although the customer need not elect to choose a higher minimum commitment level, it risks paying the hefty overage penalties again if it does not.

The CDP offers no additional discount for corresponding increases in the commitment level, suggesting that there is little correlation between the committed volume of circuits and the cost of providing the circuits. Moreover, Verizon's CDP permits a customer to subscribe with a commitment level as low as 336 DS0 equivalents, no more than 15 DS1 circuits. *See* Tariff 1 Section 25.1.3(A)(5). It is more likely that the volume commitments and the incentives to ratchet the commitment levels upwards serve to lock up the customer's spending with Verizon.

Failure to meet the minimum commitment level results in a different set of penalties. The CDP requires the customer to make up the shortfall between the amount that would have been charged

to the customer at the undiscounted rate and the amount that would have been charged discounted rate under the CDP for the past 6 months. *See* Tariff 1 Section 25.1.7 (B). The customer may not reduce its commitment level for any service except for DDS and voice grade services. *See* Tariff 1 Section 25.1.3(A)(10).

Termination penalties apply to any services in the CDP when one of the services is cancelled before the expiration of the commitment period. *See* Tariff 1 Section 25.1.9(A). Verizon offers two methods of calculating termination penalties and selects the method that produces the lesser charge. *See* Tariff 1 Section 25.1.9(C). In the first method, the customer must pay 50 percent of the CDP price for its minimum commitment level for the remainder of its term. For example, if a customer with a minimum commitment level of 10,000 DS0 equivalents terminated its CDP with three years remaining, the customer would incur termination charges of $1.8 million dollars.

$10.00/month * 50% * 10,000 DS0 equivalents * 36 months = $1,800,000.00

In the second method of calculating termination liabilities, Verizon offers the customer the discounted rate for a shorter commitment period and requires the customer to repay the delta between the 5-year discount and the 3-year discount. *See* Tariff 1 Section 25.1.9.(C)(2); Tariff 11 Section 25.1.11. For example, if a customer commits to a 5-year term for special access DS1 services but terminates after 3 years, Verizon may require the customer to repay the difference between the 30 percent discount it received and the 20 percent discount it should have received. Of course, if the customer were to terminate its commitment before even the shortest commitment period, it would be required to pay back the entire discount.

Verizon's CDPs offer circuit portability. Portability under Verizon's CDPs is particularly onerous, because it requires the customer to provide the related purchase order numbers ("RPONs") for both the circuit at the old location and the circuit at the new location. It is generally unlikely that a customer would order a circuit for a new location at the same time that the circuit at the old location is scheduled for disconnection. Accordingly, customers may be forced to keep the circuit at the old location in service until the order for the new location is processed, at which point, the customer may find that the disconnection and ordering charges would have been less than the charges incurred for maintaining the active circuit.

BellSouth FCC Tariff No. 1, Section 25 Contract Tariffs, Contract Tariff No. 026 (Overlay discount)

BellSouth offers an Overlay contract tariff, which provides discounts in addition to any other discounts available through its Standard tariffs. The Overlay discounts are available only to a customer that has spent at least $10 million on qualifying services (including special access and switched access services) available from BellSouth in the preceding year and that commits to increasing its minimum revenue commitment in increments over the term of three years. *See* Sections 25.29.1(B); 25.29.1(C). The customer commits to $10 million in the first year, $10.2 million in the second, and $10.506 million in the third year. *See* Sections 25.29(E); 25.29.1(A)(1). The discounts increase in each year of the term (3 percent for the first year; 3.25 percent for the second year for anything above $10.2 million and 2 percent for anything below $10.2 million; and 3.25 percent for the third year for revenues above $10.506 million and 2

percent for anything below $10.506 million). *See* Section 25.29.3. The tariff targets growth, providing higher discounts for surpassing the minimum revenue commitments, and lower discounts for falling short of the revenue commitment. BellSouth offers a lower revenue band, which allows a customer to commit to a minimum revenue of $9 million, with similarly increasing penalties. *See id.* **[proprietary begin] [proprietary end]**

If the customer fails to meet the minimum revenue commitment, it must repay the portion of the monthly discounts that it failed to earn at the annual true-up. In the first year, the customer must pay a "shortfall charge," calculated by subtracting its qualifying revenue from the minimum revenue commitment, capped by the total amount of the discounts received from BellSouth, *i.e.*, the customer receives no discount when it fails to meet the minimum revenue commitment in the first year. *See* Section 25.29.1(E)(2)(a). In the second year, shortfall charges do not apply, and the customer will continue to receive a discount, at a lower percentage, even if it fails to meet the minimum revenue commitment. At the true-up period for the second and third years, a failure to meet the minimum revenue commitment requires that the customer repay the delta between the higher discount that it received over the months and the lower discount that it actually earned. *See* Section 25.29.1.(E)(2)(b). For example, if a customer fell short of the second year's minimum revenue commitment of $10.2 million by $0.2 million, it would have to repay $131,500.00, the difference between the higher discount and the lower discount.

Termination penalties, like the shortfall penalties, are scaled with the amount of time that the customer has spent in its commitment period. If the customer terminates in the first year, it incurs penalties of 100 percent of the rewards received for the year. In the second year, the customer must repay 75 percent of the discounts received during both years. In the third year, the customer must repay 50 percent of the discounts received all three years. In each instance, the termination penalties can exceed the amount of the discounts received for a single year of the term. *See* Section 25.29.1.(E).

SBC Tariff FCC No. 73, Section 41 Pricing Flexibility Contract Offerings
Contract Offer No. 48 - Special Access Service Offer (and accompanying tariffs) (Overlay discount)

AT&T offers an Overlay contract tariff in its legacy ILEC territory as it existed prior to the BellSouth merger that requires a minimum annual revenue commitment ("MARC") of $26.5 million in particular services in order to qualify for the discounts available under this tariff. 41.48.1. The type of services that qualify for the discounts include OPT-E-MAN Ethernet services. Once the customer chooses to participate in the tariff, the customer must purchase all such services pursuant to the tariff. SBC's Contract Tariff No. 48 is identical to Ameritech Operating Companies Tariff FCC No. 2, Section 22, Contract Offer No. 64; Pacific Bell Telephone Company Tariff FCC No. 1, Section 33, Contract Offer No. 56, and the Southern New England Telephone Company Tariff FCC No. 39, Section 25, Contract Offer No. 16, and the customer is required to participate in all of these tariffs if it chooses to participate in one. *See* Section 41.48.2(B). In short, the customer's total expenditure in AT&T's pre-merger footprint is covered by this umbrella pricing plan. Accordingly, even if there were competitors anywhere within the AT&T footprint that might be able to provide circuits at competitive rates, the

customer is likely to forego those competitive rates in order to ensure that it meets the MARC in the 13 states at issue.

[proprietary begin] [proprietary end]

The tariff offers increasing discounts over the five-year term: 0 percent for the first year, increasing, to 5 percent the second year, 10, 11, and 12 percents for the subsequent years. The discounts do not apply to all of the services that contribute to the MARC but only to a subset of those services, specifically, the services for which AT&T has received pricing flexibility. *See* Sections 41.48.1; 41.48.2(C).

The MARC begins at $26.5 million for the first two years of the term, but it ratchets upward at the beginning of the third year if the customer's spending at SBC has increased. SBC sets the third-year MARC by summing the customer's actual monthly spend for the last 3 months of the second year and multiplying that figure by 4. *See* Section 41.48.4(A). The customer may only decrease the MARC once in the 5-year term after the initial 2 years. Failure to achieve the MARC by the end of the term year requires the customer to pay a true-up payment of the difference between the MARC and the actual revenues for the year. *See* Section 41.48.4. Failure to remit the true-up payment results in termination of the contract and the concomitant penalties.

Termination penalties are significant, resulting in a total refund of 100 percent of the discounts received over the preceding 6 months prior to termination. *See* Section 41.48.9. Additionally, the customer must also pay any non-recurring charges that were waived under the contract as well as a percentage of the MARC for all five years of the term. For example, a customer terminating the contract in the third year of the term, with a third-year MARC of $40 million (with $35 million in qualifying services) will be subject to the following charges:

Termination Charges	
6 months discount for $35 million in qualifying services	$ 1,750,000.00
12.5% of the Year 3 MARC	$ 5,000,000.00
12.5% of Year 3 MARC for the remaining years of the term	$ 10,000,000.00
Total Termination Liability	**$ 16,750,000.00**

The significant penalty discourages any move from SBC's tariff. Even if a competitor were able to supply a substantial portion of the customer's demand at a significant discount, it would be virtually impossible to cover the termination penalties.

In addition to the MARC, the customer must also commit to purchasing 98 percent of the qualifying services under the tariff, limiting the customer's ability to purchase of UNEs from SBC to 2 percent of its total expenditure at SBC. *See* Section 41.48.3(E). Failure to maintain the percentages would result in termination of the contract and the subsequent penalties. This commitment has the same effect as discussed above in section on the Qwest RCP.